

Cultural Resources Interest Group Comments on Ecology's Draft Status Report (9/10/13) and Draft SEPA Rule (9/17/13)

October 3, 2013

First, we would like to thank the Department of Ecology and the SEPA Rule Making Advisory Committee for their work during the entire SEPA rulemaking process (August 2012-present). While we have made a concerted effort to keep the larger cultural resource constituency informed about the process, the following comments are those of the cultural resources representatives to the Advisory Committee alone.

It is necessary to preface our comments with a note about the related and still outstanding report of the activities of the separate Cultural Resources Workgroup (see next paragraph for explanation). Although Ecology stated at the September 17 Advisory Committee meeting that their report would be made available prior to today's October 3 comment deadline, Ecology has yet to release the report. It is difficult to comment comprehensively on the Draft SEPA Rule until Ecology releases the report. Without the report, comparison of SEPA and non-SEPA proposals is impossible. We urge Ecology to complete their report with the input of the Workgroup and make it available for review.

In March 2013, Ecology convened a separate Cultural Resources Workgroup to address potential improvements via SEPA or "other means" per SB 6406. Members of the Workgroup represent parties with an interest in House Bill 1809 introduced by Rep. McCoy, including Cities, Counties, Cultural Resources, the Department of Archaeology and Historic Preservation (DAHP), and Tribal attorneys and lobbyists. The fifth and final meeting was held Monday, August 5, 2013. Ecology is drafting a report for submission to the Ecology Director and Rep. McCoy. It is expected that the report will assist Ecology and the Advisory Committee in determining which cultural resources elements should be included in the SEPA rules and which should be addressed outside SEPA (e.g. in other existing regulations like GMA or SMA; in a stand-alone regulation).

Background

SEPA explicitly includes cultural resources and is intended generally to "preserve important historic, cultural, and natural aspects of our national heritage" and prevent "probable significant adverse environmental impact." The purpose of the modernization called for in SB 6406 is to bring SEPA in line with current land-use planning and development regulations, including the Growth Management Act (GMA) and the Shoreline Management Act (SMA); however, not all local jurisdictions use the GMA or the SMA to plan for cultural resources, even though their protection is a stated goal of both Acts.

As a result, various aspects of the SEPA rulemaking, such as the directive to increase the thresholds for SEPA review of minor construction projects, will result in an increased number of projects that are not reviewed for impacts to cultural resources via the SEPA Checklist. The resulting impacts may well constitute a "probable significant adverse

environmental impact” (RCW 43.21C.031) and could result in violation of State cultural resource law (RCW 27.53 and 27.44). Such a scenario is in direct conflict with the broad agreement Ecology reported was reached during the multi-year effort leading up to SB 6406: “Reform will not reduce protection of the natural and built environment.”

Modernizing SEPA necessarily involves not only the proposed streamlining efforts but also a heightened recognition of cultural resource issues and the increased availability of relevant information available to local jurisdictions during planning and development activities [e.g. DAHP’s online WISAARD database]. It is no longer acceptable to ignore a critical pre-project opportunity to determine if a hole is to be dug in a high probability zone for archaeology or if a new building will affect existing historic resources. Pre-project review like that conducted via SEPA can help prevent situations like the Port Angeles Graving Dock.

COMMENTS

Exemption for demolition of buildings (pg. 12 of status report; pg. 18 of draft rule) – According to the Draft Status Report, Ecology is not planning any amendments to this section; however, we continue to request an amendment that includes the phrase “listed in or eligible for listing in an historic register” in order to clarify the current phrase “recognized historical significance” according to standard professional practice.

At the September 17 Advisory Committee meeting, general support was expressed for changing the current phrase “recognized historical significance” to “listed in an historical register” for clarity; however, including the phrase “or eligible for listing” was opposed, primarily due to concerns about the time it would take staff of local jurisdictions to determine a structure’s eligibility. Some Committee members, for example, oppose an amendment that would require staff efforts beyond consulting an existing register. This approach is flawed, however, as existing registers are incomplete; that is, many eligible buildings have not yet been added to a register, and more buildings become eligible over time. We have presented a process for staff to follow in order to determine eligibility, and we believe such efforts are merited in the face of demolition. At a minimum, DAHP is always available to advise staff on questions of eligibility.

Past opposition to the “eligible for listing” language also stemmed, in part, from an erroneous notion that “eligibility” is tied solely to the age of a building. In addition to age, integrity and significance are also considered when determining eligibility. All three factors (age, integrity, significance) are considered according to established criteria.

Exception to the Exemptions-Cultural Resources (pg. 29 of status report; pg. 15 of draft rule) – As stated above, it is difficult to comment comprehensively on this item until Ecology’s report of the activities of the separate Cultural Resources Workgroup is released. It is expected that the report will assist Ecology and the Advisory Committee in determining which cultural resources elements should be included in the SEPA rules and which should be addressed outside SEPA (e.g. in other existing regulations like GMA or SMA; in a stand-alone regulation). Without the report, comparison of SEPA and non-SEPA proposals is impossible.

According to the Draft Status Report, rather than creating an exception to the exemptions for cultural resources, Ecology is proposing inclusion of the “planning-level approach” we have presented throughout the rulemaking process as a required “finding” for raising maximum thresholds for minor new construction. The proposed language, therefore, would only apply to jurisdictions raising their exempt levels after the current round of rule making. While we support the current proposed language, we fear jurisdictions not covered by this section will continue to default to the “applicable state and federal regulations” standard, which currently addresses the treatment of cultural resources discovered after the fact (RCW 27.44 and 27.53) and results in no real improvement to the present situation.

At the September 17 Advisory Committee meeting, concerns with the proposed language included definitions and standards (e.g. CRMP, pre-project cultural resources review); where to house the CRMP (i.e. in the Comp Plan or as a freestanding document); requiring mandatory interlocal agreements with DAHP re: data-sharing; and liability concerns with the Statewide Predictive Model and other DAHP data. We believe the questions of definitions and standards are easily addressed via established professional practice, and DAHP is available to answer questions about interlocal agreements and liability concerns. The remaining issue, then, is that of *where* in the regulations these planning-level elements should be housed, and Ecology’s proposal provides a potential solution.

The required “findings” section allows jurisdictions to adopt higher maximum thresholds through ordinance or resolution provided the jurisdiction demonstrates it has adequately addressed “environmental analysis, protection and mitigation” in applicable and specific “adopted development regulations, comprehensive plans, and applicable state and federal regulations.” The proposed language would provide a consistent standard for jurisdictions to demonstrate that cultural resources have been adequately considered. We support this approach considering current streamlining efforts because, as long as cultural resources remain an optional element under the GMA and, by extension, comprehensive planning, relying on such regulations and plans will not necessarily address cultural resource concerns.

We continue to advise that projects should *not* be SEPA-exempt for cultural resources if the jurisdiction has neither a planning-level nor a project-level approach.

Additionally, all applicants and SEPA Officials should be informed of the following:

- Washington State law (RCW 27.53 and 27.44) protects archaeological resources (RCW 27.53) and Indian burial grounds and historic graves (RCW 27.44) located on both the public and private lands of the State.
- An archaeological excavation permit issued by DAHP is required in order to disturb an archaeological site.
- Knowing disturbance of burials/graves and failure to report the location of human remains are prohibited at all times (RCW 27.44 and 68.60).

Environmental Checklist (pg. 35 of status report; pg. 65 of draft rule) - Ecology is considering changes to section 13 of the Checklist in order "to better address identification of potential historic and cultural resources that may be on a site." Ecology's proposed alternate wording differs from language we suggested during last year's (2012) rule making, and we submit that wording again for consideration:

SEPA Checklist – Section B, Question #13

13(a) Current question: Are there any places or objects listed on, or proposed for, national, state, or local preservation registers known to be on or next to the site? If so, generally describe.

Revised question: Are there any buildings or structures over 45 years old listed in or eligible for listing in national, state, or local preservation registers located on or near to the site? If so, please record below. (Check DAHP website and with local historical societies or commissions).

13(b) Current question: Generally describe any landmarks or evidence of historic, archaeological, scientific, or cultural importance known to be on or next to the site?

Revised question: Is there any evidence of Indian or historic use or occupation, human burials or old cemeteries on or next to the site? Is there any material evidence, artifacts, or areas of cultural importance on or next to the site? Please list any professional studies conducted at the site to identify such resources.

13(c) Current question: Proposed measures to reduce or control impacts, if any:

Revised question: Proposed measures to avoid, mitigate, or minimize disturbance to resources. Please include plans for the above and any permits that may be required. (Please see RCW 27.44, 27.53, RCW 68.50 and 68.60 to see if permits may be required).

Public Notice (pg. 33 of status report; pg. 6 and 8 of draft rule) - We support Ecology's stated goals for the SEPA Register:

- i. A website submittal format for uploading documents to be added to the SEPA Register;
- ii. Public access using the Register to a downloadable version of the electronic documents that are submitted to the Register.

However, we are concerned that the proposed improvements to public notice are too limited in scope. Because applicants and SEPA Officials often overlook cultural resources, notification is a crucial element of the SEPA process, and it is often the only notice we receive. The current rule does not require notification for projects that fall within the new maximums. From a cultural resources standpoint, this effectively precludes public comment for such projects, as SEPA is the only regulatory process at the State level that requires consideration of impacts to cultural resources. Such a scenario is in direct conflict with the broad agreement Ecology reported was reached: "Reform [of the notification process] will be equal or better [than the current process]."

ALTERNATIVE APPROACH

In our experience, significant savings of time and money are achieved by considering impacts during pre-project review like SEPA rather than during an inadvertent discovery during project implementation. The means for doing so are not inherently burdensome and do not require additional staff. With the increased availability of relevant information (e.g. DAHP's online WISAARD database, data-sharing agreements), local jurisdictions can readily integrate specific cultural resource findings during planning and development activities.

We reiterate the types of cultural resources "findings" necessary for a project to be SEPA-exempt; again, they are not dependent on size but on locational information.

"Project-level" approach-

Exempt for archaeology if *any*:

- 1) Prior negative survey on file.
- 2) No ground disturbance proposed.
- 3) Project in 100% culturally-sterile fill.

Exempt for built environment if *both*:

- 1) Less than 45 years old; *and*
- 2) Not eligible for or listed in any historic register or historic survey.

"Planning-level" approach (note: both options would include a project-level approach)-

Exempt for archaeology *and* built environment if:

- 1) Cultural resource management plan is incorporated into Comp Plan, *or*
- 1) Local ordinance or development regulations address pre-project review and standard inadvertent discovery language (SIDL), *and*
- 2) Data-sharing agreement is in place.

For *all* projects, exempt or not-

Include SIDL on all related permits (compliance with RCW 27.53, 27.44)

Conclusion

We cannot support proposals that result in fewer notifications and/or increased exemptions granted without appropriate cultural resource findings, as this will only raise the potential for increased impacts to cultural resources.

Cultural resource protection is not, as some have suggested, an "outlier" issue in terms of SEPA specifically or environmental protection generally. Cultural resources are the tangible evidence of our collective history. They are part of what makes communities unique, and they impart a sense of place critical to our individual and group identity.

Cultural resources enhance economic development pursuits and frequently represent a value-added component of successful projects. They are an integral part of sustainable development as measured from the "triple bottom line" perspective (i.e. people, planet,

profit). It is no mistake that “people” (i.e. stakeholders) come first.

It *is* possible to include cultural resources in pre-project review of potential impacts if we are willing to do so.